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Teoh Ying Rin v Savatery a/p Jayaraman

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-262-02 OF 2023
HASHIM HAMZAH, CHOO KAH SING AND AHMAD KAMAL JJCA
20 JANUARY 2025

C

Succession — Probate — Testamentary capacity — Suspicious circumstances surrounding making of will — Whether testator had knowledge and approved entire contents of will — Whether testator's intention in previous wills irrelevant — Whether previous wills revoked — Whether proving testamentary capacity different from proving existence of suspicious circumstances — Whether evidence produced sufficiently dispelled and removed suspicious circumstances surrounding making of will — Whether High Court judge lacked judicial appreciation of evidence of fact presented — Whether appellate intervention warranted

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Not long after the execution of his last will and testament ('the impugned will'), Nantha Kumaran ('the testator') passed away. Thereafter, the appellant, the executor and trustee of the testator's impugned will, filed an originating summons seeking for a grant of probate of the impugned will. However, the application was contested by the respondent, the lawful wife of the testator. From the outset, the respondent did not challenge the testator's testamentary capacity nor the authenticity of the signature of the testator on the impugned will. However, the respondent contended that there were suspicious circumstances surrounding the making of the impugned will. It was also argued that the testator was subject to undue influence in signing and making the impugned will. On the contrary, to substantiate the fact that the testator had the knowledge and had given his approval of the whole contents of the impugned will, the appellant had showed the respondent the impugned will together with two letters written by the testator, one addressed to the appellant and the other to the respondent. Nevertheless, in declaring the will to be null and void, the High Court judge ('HCJ') found that there were glaring suspicious circumstances surrounding the making of the impugned will, namely: (a) the appellant being the propounder of the impugned will had taken a prominent role in the making and execution of the same, including preparing the impugned will; and (b) the appellant would be receiving a substantial benefit of the testator's estate if the impugned will was probated. The HCJ was also troubled by the fact that the appellant had prepared two wills previously, one in 2017 and the other in 2018 and could not produce the two wills in the trial by alleging that the two wills were destroyed. Hence, the present appeal.

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Held, allowing the appeal:

(1) The fact of the non-production of the 2018 will could not be equated to the appellant having failed to remove the suspicious circumstance in reference to the testator's knowledge and approval of the contents of the impugned will. The non-production of the 2018 will was not material to the testator's knowledge and approval of the contents of the impugned will. At the highest, the production of the 2018 will could only show that there were changes made to the percentage of the bequeathed shares in the company known as Advanced Fertilizer Manufacturer Sdn Bhd. It required more than that to show that the testator did not have the knowledge and approval of the entire contents of the impugned will in order for the court to invalidate the impugned will wholly (see para 27).

(2) The HCJ frowned upon the appellant only making a disclosure that the testator had previously made two wills in her affidavit-in-reply in an application for further and better particulars which was filed by the respondent. This was irrelevant consideration because the testator's intention in the two previous wills was not relevant as they have been revoked. What was material before the trial court was the testator's intention of the impugned will that was to be probated, not the intention of the testator in the previous will which had been revoked. A previous will was relevant when the challenge was against a purported will (allegation of a forged will) which was intended to be probated (see para 28).

(3) The appellant did not deny that the testator was physically weak at the material time when the testator executed the impugned will. However, the testator's mental condition remained fit to understand what he was doing. Further, the respondent did not challenge the testamentary capacity of the testator. Proving that the testator had the testamentary capacity was different from adducing affirmative proof to remove or dispel the existence of suspicious circumstances. The HCJ had fell into error by mixing up the two (see para 30).

(4) Reading the impugned will together with the two letters could well establish that the testator was fully aware of the making of the impugned will as well as that he had full knowledge and approval of the entire contents of the impugned will. The HCJ merely made mention of the two letters in her grounds of judgment and did not make any finding the two letters were forged or that the contents of the two letters had been disproved. Therefore, the two letters stand as credible evidence before the trial court to support the testator's knowledge and approval of the contents of the entire impugned will (see para 32).

(5) The two letters were sufficient evidence to dispel or remove any suspicious circumstances surrounding the making of the impugned will. The two letters were not disproved and were the best evidence to show the testator had the knowledge and had given his approval of the contents

of the impugned will. The two letters were dated the same date as the impugned will, therefore, that inferred the testator executed them on the same day and that the testator was certain as to how he wanted to dispose his properties upon his demise (see para 33).

(6) The said letter spoke volume of the testator's wishes. The testator wanted his business legacy to continue and at the same time he wanted the respondent to enjoy the profits as long as the business continues to do well.It was not in dispute that the testator had founded the company(ies) and built the business from a small business to a very successful business. He had loyal employees who had worked many years in his company(ies), for example, the appellant. The testator had a strong character, and he knew what he was doing at all times, even when the testator was terminally ill. Therefore, the appellant's evidence had sufficiently dispelled and removed the suspicious circumstances surrounding the making of the impugned will (see paras 42–43 & 45).

(7) The evidence (witness statements) of the two witnesses who witnessed the testator's signature could only go to the formation of a valid will, not for purpose of determining the impugned will to be invalid for not dispelling or removing the suspicious circumstances surrounding the making of the will. The role of the witnesses of the impugned will was to witness the signing and verify that it was the testator who signed on the will. They were not to verify the testator was fully aware of the terms of the will, and that the testator acknowledged and approved each and every term of the impugned will. Therefore, the HCJ had fell into error of law on the evidence to dispel or remove the suspicious circumstances and had lacked judicial appreciation of the evidence of fact presented before the trial court (see paras 37–38 & 48).

[Bahasa Malaysia summary

Tidak lama selepas membuat wasiat dan perjanjian terakhirnya ('wasiat yang dipertikaikan'), Nantha Kumaran ('pewasiat') meninggal dunia. Selepas itu, perayu, wasi dan pemegang amanah wasiat yang dipertikaikan, memfailkan saman pemula untuk geran probet untuk wasiat yang dipertikaikan. Walau bagaimanapun, permohonan itu dipertikaikan oleh responden iaitu isteri sah pewasiat. Sejak mulanya, responden tidak mencabar kapasiti pewasiat ketika wasiat tersebut mahupun kesahihan tandatangan pewasiat pada wasiat yang dipertikaikan. Walau bagaimanapun, responden berhujah bahawa terdapat keadaan yang mencurigakan mengenai ketika wasiat yang dipertikaikan dibuat. Dia juga menyatakan bahawa pewasiat telah dipengaruh secara tidak wajar ketika menandatangani dan membuat wasiat yang dipertikaikan. Sebaliknya, untuk membuktikan fakta bahawa pewasiat mempunyai pengetahuan dan telah memberikan kelulusannya terhadap keseluruhan kandungan wasiat yang dipertikaikan, perayu telah menunjukkan kepada responden wasiat yang dipertikaikan bersama-sama dengan dua surat yang

ditulis oleh pewasiat, satu ditujukan kepada perayu dan satu lagi kepada responden. Walau bagaimanapun, dalam mengisytiharkan wasiat itu terbatal dan tidak sah, hakim Mahkamah Tinggi ('HMT') mendapati bahawa terdapat keadaan mencurigakan yang jelas mengenai pembuatan wasiat yang dipertikaikan, iaitu: (a) perayu sebagai penasihat wasiat yang dipertikaikan telah mengambil peranan penting dalam membuat dan melaksanakan wasiat yang sama, termasuk menyediakan wasiat yang dipertikaikan; dan (b) perayu akan menerima faedah yang besar daripada harta pusaka pewasiat sekiranya wasiat yang dipertikaikan itu dibuktikan. HMT juga mendapti terdapat fakta bahawa perayu telah menyediakan dua wasiat sebelum ini, satu pada 2017 dan satu lagi pada 2018 dan tidak dapat mengemukakan kedua-dua wasiat dalam perbicaraan kerana dikatakan bahawa kedua-dua wasiat itu telah dimusnahkan. Oleh itu rayuan ini difailkan.

Diputuskan, membenarkan rayuan:

(1) Fakta bahawa wasiat 2018 tidak dikemukakan tidak boleh disamakan dengan perayu yang gagal menghilangkan kecurigaan kepada pengetahuan dan kelulusan pewasiat terhadap kandungan wasiat yang dipertikaikan. Wasiat 2018 yang tidak dikemukakan tidak penting untuk membuktikan pengetahuan dan kelulusan pewasiat terhadap kandungan wasiat yang dipertikaikan. Wasiat 2018 yang dikemukakan hanya menunjukkan bahawa terdapat perubahan yang dibuat pada peratusan saham yang diwariskan dalam syarikat yang dikenali sebagai Advanced Fertilizer Manufacturer Sdn Bhd. Lebih daripada itu diperlukan untuk menunjukkan bahawa pewasiat tidak mempunyai pengetahuan dan kelulusan keseluruhan kandungan wasiat yang dipertikaikan agar mahkamah dapat membatalkan wasiat yang dipertikaikan sepenuhnya (lihat perenggan 27).

(2) HMT terganggu terhadap fakta bahawa perayu hanya membuat pendedahan bahawa pewasiat sebelum ini telah membuat dua wasiat dalam afidavit jawapan dalam permohonan untuk butiran lanjut yang difailkan oleh responden. Hal ini tidak relevan untuk pertimbangan kerana niat pewasiat dalam dua wasiat sebelumnya tidak lagi relevan kerana ianya telah dibatalkan. Apa yang penting di hadapan mahkamah perbicaraan ialah niat pewasiat terhadap wasiat yang dipertikaikan, bukannya niat pewasiat dalam wasiat terdahulu yang telah dibatalkan. Wasiat terdahulu adalah relevan sekiranya wasiat (terlibat dengan tuduhan wasiat palsu) ketika pembuatannya (lihat perenggan 28).

(3) Perayu tidak menafikan bahawa pewasiat lemah secara fizikal pada masa material apabila pewasiat membuat wasiat yang dipertikaikan. Walau bagaimanapun, keadaan mental pewasiat kekal cergas untuk memahami apa yang dilakukannya. Selanjutnya, responden tidak mencabar kapasiti wasiat pewasiat. Mempersoalkan kapasiti pewasiat adalah berbeza

dengan mengemukakan bukti kukuh untuk menghapuskan atau menghilangkan kewujudan keadaan yang mencurigakan. HMT telah terkhilaf dengan mencampuradukkan kedua-duanya (lihat perenggan 30).

(4) Setelah membaca wasiat yang dipertikaikan bersama-sama dengan kedua-dua surat itu, dibuktikan bahawa pewasiat menyedari sepenuhnya pembuatan wasiat yang dipertikaikan serta dia mempunyai pengetahuan dan kelulusan penuh mengenai keseluruhan kandungan wasiat yang dipertikaikan. HMT hanya menyebut kedua-dua surat itu dalam alasan penghakimannya dan tidak membuat sebarang penemuan bahawa kedua-dua surat itu dipalsukan atau kandungan kedua-dua surat itu telah disangkal. Oleh itu, kedua-dua surat itu merupakan bukti yang boleh dipercayai di hadapan mahkamah perbicaraan untuk menyokong pengetahuan dan kelulusan pewasiat terhadap kandungan keseluruhan wasiat yang dipertikaikan (lihat perenggan 32).

(5) Kedua-dua surat itu adalah bukti yang mencukupi untuk menghilangkan atau menghapuskan sebarang keadaan yang mencurigakan mengenai pembuatan wasiat yang dipertikaikan. Kedua-dua surat itu tidak disangkal dan merupakan keterangan terbaik untuk menunjukkan pewasiat mempunyai pengetahuan dan telah memberikan kelulusannya terhadap kandungan wasiat yang dipertikaikan. Oleh itu, kedua-dua surat itu bertarikh pada tarikh yang sama dengan wasiat yang dipertikaikan, yang menyimpulkan bahawa pewasiat melaksanakannya pada hari yang sama dan pewasiat pasti mengenai cara dia hartanya dibahagikan selepas kematiannya (lihat perenggan 33).

(6) Surat tersebut menyentuh mengenai kehendak pewasiat. Pewasiat mahu legasi perniagaannya diteruskan dan pada masa yang sama mengkehendaki responden menikmati keuntungan selagi perniagaan terus berjalan dengan baik. Tidak dipertikaikan bahawa pewasiat telah mengasaskan syarikat dan membina perniagaan daripada perniagaan kecil kepada perniagaan yang sangat berjaya. Dia mempunyai pekerja setia yang telah bekerja bertahun-tahun di syarikatnya, sebagai contoh, perayu. Pewasiat mempunyai perwatakan yang kuat dan dia tahu perkara yang dilakukan pada setiap masa, walaupun pewasiat sakit tenat. Oleh itu, keterangan perayu telah cukup menghilangkan dan menghapuskan keadaan yang mencurigakan ketika pembuatan wasiat yang dipertikaikan (lihat perenggan 42–43 & 45).

(7) Keterangan (pernyataan saksi) kedua-dua saksi yang menyaksikan tandatangan pewasiat hanya boleh digunakan untuk pembentukan wasiat yang sah, bukan untuk tujuan menentukan wasiat yang dipertikaikan sebagai tidak sah kerana ianya tidak menghilangkan atau menghapuskan keadaan yang mencurigakan ketika pembuatan wasiat.

Peranan saksi wasiat yang dipertikaikan adalah untuk menyaksikan tandatangan dan mengesahkan bahawa pewasiat yang menandatangani wasiat itu. Mereka tidak boleh mengesahkan pewasiat mengetahui sepenuhnya syarat-syarat wasiat dan pewasiat mengakui dan meluluskan setiap terma wasiat yang dipertikaikan. Oleh itu, HMT telah terkhilaf dari segi undang-undang ketika meneliti keterangan untuk menghilangkan atau menghapuskan keadaan yang mencurigakan dan terkhilaf ketika membuat penilaian kehakiman terhadap bukti fakta yang dikemukakan di mahkamah perbicaraan (lihat perenggan 37–38 & 48).]

Cases referred to

Banks v Goodfellow [1861–73] All ER Rep 47; (1870) LR 5 QB 549, QBD (refd)

Barry v Butlin (1838) 2 Moo PCC 480, PC (refd)

Chin Jhin Thien & Anor v Chin Huat Yean @ Chin Chun Yean & Anor [2020] 4 MLJ 581; [2020] 7 CLJ 137, FC (refd)

Fuller v Strum [2002] 1 WLR 1097, CA (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Karn Woon Lin & Anor v Cheah Chor Bok [2010] 5 MLJ 834, HC (refd)

Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors [1998] 3 MLJ 457, HC (refd)

Lamkin v Babb (1752) 1 Lee 1 (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)

Tob Weng Keong & Anor v Tob Chee Hoong [2019] MLJU 1435; [2019] 10 CLJ 150, CA (refd)

Udham Singh v Indar Kaur [1971] 2 MLJ 263, FC (refd)

Wingrove v Wingrove (1885) 11 PD 81 (refd)

Legislation referred to

Wills Act 1959 ss 5(2), 9, 12

Appeal from: *Savatery a/p Jayaraman v Teoh Ying Rin* [2024] 7 MLJ 163 (High Court, Shah Alam)

Tharminder Singh (with Joycelyn Goh and Andrew Phua) (Izral Partnership) for the appellant.

Liew Teck Huat (with Lim Qi Si, Ong Kang Nyong and Anisya Kaur) (Zaid Ibrahim Suflan TH Liew & Partners) for the respondent.

Choo Kah Sing JCA:

INTRODUCTION

[1] This appeal centers on the issue of the testator's knowledge and approval of the terms of a will. On 10 October 2024, the parties' respective counsels had submitted orally before this court, and the court decided to reserve its decision. This court, after having considered both sides' submissions, and after having examined the evidence at the court below, has come to a decision, and the decision is as below.

SALIENT FACTS

[2] Nantha Kumaran a/l Saravanamuthu (hereafter the testator) had executed his last will and testament on 29 April 2019 (hereafter 'the impugned will'). Not long after the execution of the impugned will, the testator passed away on 7 June 2019. The appellant, Teoh Ying Rin, who was the defendant at the court below, was appointed as the executor and trustee of the testator's impugned will. Sometime in July 2019, the appellant filed an originating summons via Suit No BA-32NCvC-580–07 of 2019 seeking for a grant of probate of the impugned will. However, the application was contested by the respondent, Savatery a/p Jayaraman, the lawful wife of the testator. Consequently, the contentious probate was converted to a writ action (BA-22NCVC-167–06 of 2020) at the court below, and the respondent, being the plaintiff at the court below, took out the said action against the appellant. The respondent contended that it was not safe for the court to probate the impugned will because there were suspicious circumstances surrounding the making of the impugned will.

THE DECISION OF THE HIGH COURT

[3] From the outset, the respondent did not challenge the testator's testamentary capacity nor the authenticity of the signature of the testator on the impugned will. The issues before the High Court were then narrowed down to first, whether there were suspicious circumstances surrounding the making of the impugned will which could move the court not to allow the impugned will to be probated if those suspicious circumstances were not dispelled or removed through affirmative proof, and secondly, whether the testator was subject to undue influence in signing and making the impugned will.

[4] The learned High Court judge, after a full trial, was satisfied that there were suspicious circumstances surrounding the making of the impugned will, and the appellant's evidence did not remove those suspicions to satisfy the judicial conscience into believing and accepting that the terms in the impugned

will were the true intention of and approved by the testator and that the terms represented the testator's last wishes.

[5] The learned High Court judge found the following facts were glaring suspicious circumstances surrounding the making of the impugned will. First, the appellant being the propounder of the impugned will had taken a prominent role in the making and execution of the same, including preparing the impugned will. Secondly, the appellant would be receiving a substantial benefit of the testator's estate if the impugned will was probated (see: *Fuller v Strum* [2002] 1 WLR 1097, the English CoA; *Barry v Butlin* (1838) 2 Moo PCC 480 at p 483).

[6] The learned High Court judge was also troubled by the fact that the appellant had prepared two wills previously, one in 2017 and the other in 2018. The appellant could not produce the two wills in the trial, and the reason offered by the appellant was that they had been destroyed. The appellant informed that she did not keep any softcopy of the two previous wills. The learned High Court judge observed that there were discrepancies in the appellant's testimony in the witness statement and the oral testimony in court. The learned High Court judge stated in her grounds of judgment as follows:

> [100] On the second part of issue (i) ie, whether this court should allow the 2019 will to be probated, the answer depends on whether the defendant dispels or removes the suspicious circumstances by presenting clear and cogent evidence and the conscience of this court is satisfied that the 2019 will does express the last will and testament of the testator.
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> [101] As discussed above, the defendant's oral testimony during the trial as to how she had prepared the 2019 will differs from the evidence in her witness statement. In her witness statement, she stated in A37 that she was asked to prepare the 2019 will a day before the execution of the will based on instructions given by the testator on how to distribute his assets upon his death. But during trial, she testified that she had prepared the 2019 will by amending the amount of the shares in the company given to her by the testator in the soft copy of the 2018 will. She said the percentage of shares given to her in the 2019 will was higher than that in the 2018 will.

[7] The learned High Court judge went on to say as follows:

> [104] Questions surrounding the circumstances relating to the making of the 2019 will remain unanswered: was the defendant's statement in A37 of her witness statement true, or was her oral testimony in court true? Did the testator also bequeath the defendant in the 2018 will his share of Advanced Fertilizer's land and factory, his shares in the company, 60% of the monies in his bank accounts in RHB Bank and Public Bank, and the residue of his estate? Was the only difference between the 2018 will and the 2019 will the increase in the number of his shares in Advanced Fertiliser that he bequeathed to the defendant in the 2019 will?
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> [105] For this reason, I find that it is impossible for this court to determine which

of defendant's evidence as to how she prepared the 2019 will is true since she did not produce the 2018 will in court or the paper on which she claims the testator had written his instructions to increase the percentage of shares in the company he was bequeathing to her in the 2019 will.

[106] The law is settled that any suspicious circumstances in the making of a will must be removed to 'the satisfaction of the judicial conscience' before a court can allow the will to be probated. Accordingly, until and unless this court is judicially satisfied that the evidence presented by the defendant has removed the suspicious circumstances, it ought not to allow the 2019 will to be probated.

[107] As the defendant failed to produce any evidence to dispel or remove the suspicious circumstances, this court finds that the defendant had failed to discharge her burden of proof that the 2019 will was the last will and testament of the testator.

[8] The learned High Court judge was not satisfied that the appellant's explanations had removed the suspicious circumstances surrounding the making of the impugned will nor did she satisfy the judicial conscience to probate the impugned will that it was the last will and testament of the testator. Hence, the learned High Court judge declared that the impugned will was null and void and of no effect, and the impugned will should not be probated. Consequently, the testator was declared as having died intestate.

[9] The learned High Court judge found it was unnecessary to make a finding on the second issue vis a vis whether did the testator was subject to undue influence in signing and making the impugned will, because the appellant had failed on the balance of probabilities to remove the suspicions in the making of the impugned will.

ANALYSIS AND FINDINGS OF THIS COURT

The law

[10] There is a presumption in law that a will is a valid will if, first, the will is made in the lifetime of a testator; secondly, the testator has attained the age of majority; thirdly, the testator is of sound mind; fourthly, the will is in writing; and lastly, the will is executed in compliance with s 5(2) of the Wills Act 1959 (Revised 1988) (Act 346) (hereafter 'the Act'). However, the Act has set down certain limitations for the probate of a valid will and the effect of the Act could be that a gift is null and void or be revoked despite all the above criteria being present. For example, s 9 of the Act states gifts to an attesting witness or to wife or husband of attesting witness could be null and void, unless such person so attesting be admitted as a witness to prove the execution or to prove the validity or invalidity thereof (see also s 12 of the Act).

[11] It is trite law that the party who seeks to probate a will bears the burden

of proof (see: *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 at p 12; [2004] 4 CLJ 309 at p 322 (FC)). Although the law presumes the will is a valid will if all the above criteria are present, however, if the will was prepared and executed under circumstances that raise 'a well-grounded suspicion' that the will or some part of the will could not be the express mind of the testator, then the propounder must satisfying the court by removing the suspicions through affirmative proof that the testator had the knowledge and approval of the contents of his/her will.

[12] The proving of the testator's knowledge and approval of the contents of the will is different from the proving of the testamentary capacity or sound mind of the testator. The later relates to the inability to make an informed decision in that it refers to the 'sound disposing mind' of the testator. 'A testator is said to have testamentary capacity when the testator is fully conscious, has a sound mind, understands and approves the contents of the will' (see *Chin Jhin Thien & Anor v Chin Huat Yean @ Chin Chun Yean & Anor* [2020] 4 MLJ 581 at p 600; [2020] 7 CLJ 137 at p 154 (FC); see also *Banks v Goodfellow* [1861–73] All ER Rep 47; (1870) LR 5 QB 549; *Udham Singh v Indar Kaur* [1971] 2 MLJ 263 (FC); *Gan Yook Chin*; *Khaw Cheng Bok & Ors v Khaw Cheng Poon & Ors* [1998] 3 MLJ 457 (HC)). The apex court in *Chin Jhin Thien* sums up the law on the meaning of testamentary capacity as follows:

> [76] ... the position of the law on testamentary capacity is clear: if the testator is ill, it does not deprive his ability or capacity to execute it. There must be clear evidence to depict on insane delusion existing in the testator's mind at the time of making of the will. Essentially, it is sufficient for the testator, at the time the will is executed to have sufficient mental ability to understand he is making a will, the effect of making the will, and the general nature and extent of his property. The duty of the court is to give effect to the will of the testator and not deprive him of the right to select the beneficiaries based on his wish.

[13] As for the former, it goes to the testator's knowledge and approval of the contents of the will. This court could do no better than reproduce the relevant passages in the decision of the Court of Appeal in *Tob Weng Keong & Anor v Tob Chee Hoong* [2019] MLJU 1435; [2019] 10 CLJ 150 at p 167, to explain the posited law. The relevant passages are as follows:

> [40] The question of suspicious circumstances in the making of a will is relevant in the context of the testator's knowledge and approval of the contents of a will. A testator must know and approve of the contents of his will. Underlying this rule is the rationale that a will must be the result of a testator's own intelligence and volition, though its contents need not originate from the testator provided he understands and approves them (*Constable v Tufnell* (1833) 4 Hag Ecc 465). If the contents of a will originate from another person and the testator executes it in ignorance of its contents, the will is invalid (*Hastilow v Stobie* (1865) LR 1 P & D 64).

[41] English common law suggests that whilst the testator must know and approve of the contents of his will, he need not know its legal effect. Thus, if the testator does know and approve of the contents of his will, it is immaterial that he, or the draftsman employed by him, is mistaken as to its legal effect. In *Collins v Elstone* [1893] P 1, there was a mistake as to the legal effect of a revocation clause in a printed will form and in *Re Horrocks* [1939] P 198, the use of word 'or' instead of 'and', in gift to charitable or benevolent objects was the solicitor's deliberate choice under mistake as to its legal effect.

[42] It is also a recognised principle the testator must know and approve of the contents of his will at the time when he executes it (*Hastilow v Stobie*). It also suffices if the testator knows and approves of the contents of the instructions which he gives to a solicitor for the preparation of a will provided (i) the will is prepared in accordance with his instructions, and (ii) at the time of execution he understands that he is executing a will for which he has given instructions. However, this principle must be applied with the greatest caution where the testator gives instructions to a lay intermediary, who in turn repeats them to the solicitor (*Battan Singh v Amirchand* [1948] AC 161).

[43] In the context of wills, suspicious circumstances are circumstances surrounding the making of the will, not circumstances surrounding the testamentary capacity of the testator (*Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97; [2002] 4 CLJ 90 (CA) at 96). *Theobald on Wills* 18th Ed at p 65 under the heading of 'Knowledge and approval of contents of will' is particularly instructive:

> *(c) Suspicious circumstances*
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> If a will was prepared and executed under circumstances which raise a well-grounded suspicion that the will (or some provision in it, such as the residuary gift) did not express the mind of the testator, the will (or that provision) is not admissible to probate unless that suspicion is removed by affirmative proof of the testator's knowledge and approval. A classic instance of suspicious circumstances is where the will was prepared by a person who takes a substantial benefit under it. Another instance is where a person was active in procuring the execution of the will under which he takes a substantial benefit by, for instance, suggesting the terms for the will to the testator and instructing a solicitor chosen by that person.
>
> However, *circumstances can only raise a suspicion of want of knowledge and approval if they are 'circumstances attending, or at least relevant to, the preparation and execution of the will itself.* (Emphasis added.)

[44] A few instances of circumstances amounting to suspicious circumstances may be instructive. In *Wintle v Nye* [1959] 1 All ER 552 where a solicitor who drafted the will for a 66 year old lady and who had been her legal adviser for several years was a substantial beneficiary under that will. In *Sarat Kumari Bibi vs Sakhi Chand Bahadur* [1929] AIR PC 45, where the writer of the will had taken a very active part in its preparation and had obtained a substantial benefit under it. In *Cushway v Harris* [2012] EWHC 2273 (Ch), a solicitor drafted wills for his elderly aunts appointing himself executor and beneficiary of one-third of their combined estate, where both testators were in poor health, had poor eyesight and one probably lacked testamentary capacity; it was held that the gravest suspicions were aroused. In

A *Musgrove's Estate, Re, Davis v Mayhew* [1927] P 264, the executrix kept the will in her possession for 16 years after learning of the testator's death but never proved it.

[14] To sum-up the position of the law, the propounder bears the burden, on the balance of probabilities, to satisfy the court to apply the presumption of the law. In the event there are suspicious circumstances surrounding the making of the will in reference to the testator's knowledge and approval of the terms of the will, then it is necessary for the propounder to dispel those suspicions. Affirmative proof must be shown to establish the testator had the knowledge and approval of the terms of the will. In other words, the contents of the will must necessarily express the mind of the testator. The court is to be 'vigilant and jealous' in examining the evidence in support of the will (see *Barry v Butlin*). The apex court in *Gan Yook Chin* further posited that the onus of establishing any extraneous vitiating element such as undue influence, as in this present case, fraud or forgery lay with those who challenge the will (see also *Karn Woon Lin & Anor v Cheah Chor Bok* [2010] 5 MLJ 834 at p 839 (HC)).

[15] A will is wholly invalid if the testator lacked testamentary capacity at the material time when executing the will. In comparison, in the event of failure to dispel or remove the suspicious circumstances in reference to the knowledge and approval of the testator to a certain part of the will, only the affected part will be declared as invalid, and it is not necessary for the whole will to be declared as invalid unless the challenge is that the testator did not know or approve the whole will.

ANALYSIS

The respondent's position

[16] In para 26(b) of the respondent's statement of claim, it was pleaded that the testator 'lacked the physical and/or mental ability and overall testamentary capacity to instruct or execute any will or testamentary at any time during this period'. 'This period' was in reference to between March 2019 and the day the testator passed away on 7 June 2019. At para 32 of the same pleading, the respondent repeated that she would contend that the impugned will was 'invalid, null and void as at the time it was allegedly made, the deceased (the testator) had no testamentary capacity, by reason of his debilitating terminal illness with excruciating pain and physical disability, which substantially affected and impaired his mental stability, rendering him mentally disorientated'.

[17] Insofar as this part of the respondent's averments and contentions are concerned, they are irrelevant in the trial because the respondent had

abandoned them at the outset of the trial. The position taken by the respondent is confirmed in the respondent's counsel's submission-in-reply at paras 5 and 6 which stated as follows:

> 5. ... We informed the Court even during pre-Trial Case Management on 18 March 2022, that we accepted the Deceased had testamentary capacity and therefore, the handwriting expert report which Teoh (the appellant) sought to adduce could be admitted without calling the maker.
>
> 6. We highlighted that our case was not that the Deceased has no testamentary capacity but that there were suspicious circumstances in the making and execution of the Will which Teoh did not explain or dispel.

[18] On this issue, we find that the appellant's counsel was correct in his submission to state that the respondent had dropped her pleaded case of lack of testamentary capacity and had focused her case on suspicious circumstances.

[19] The respondent had relied on her alternative pleaded case. The respondent contended that there were circumstances attending and relevant to the preparation and execution of the impugned will which could give raise to suspicious circumstances and had led to the inference that the terms of the impugned will did not express the mind of the testator, and that the testator did not know nor approve the contents of the impugned will at the time of execution.

[20] The following are among the alleged suspicious circumstances relied on by the respondent. The appellant herself prepared the impugned will and did not inform the respondent. The impugned will was prepared without any independent legal advice, although the testator was suffering from severe physical and mental infirmity due to his terminal illness. The appellant would receive substantial benefits of the estate of the testator. The appellant did not show that the contents of the impugned will were read to the testator and that he understood the contents of the same. The appellant had subjected the testator to extreme physical and mental stress in an attempt to get the impugned will to be attested. The appellant instructed and arranged two employees, Nor Hidayu (DW4) and Henry John (DW3) to be the witnesses of the impugned will and warned them that they should confirm the testator had signed the impugned will voluntarily and willingly should they be subsequently asked. The contents of the impugned will were not read out nor explained to the testator before he signed. The testator could have prepared a will upon being diagnosed of his terminal illness, why did he wait 16 months later to execute the impugned will? The contents of the impugned will were irrational or unusual because the testator purportedly gave away his substantial assets to the appellant who had no familial relationship. The appellant was appointed as the sole executrix and trustee of the impugned will.

[21] The relevant contents of the impugned will are reproduced as below:

I, NANTHA KUMARAN A/L SARAVANAMUTHU NRIC No: 530912-05-5281 Born on 12-Sep-1953 of No. 14B06, Ehsan Ria, Jalan Bukit 11/2, 46200 Petaling Jaya, Selangor Darul Ehsan, Malaysia of full age and sound mind hereby declare this to be my last Will and Testament and bequeath as follows:

1. I revoke all Wills written by me prior to the date of this Will.

2. I appoint as my Executor and Trustee TEOH YING RIN NRIC No: 761116-10-5370 of No. 34, Jalan Delima 7, Taman Emas, 42700 Banting, Selangor Darul Ehsan.

3. I give my share of land with buildings located at PT.1179, H.S.(M)11308, Mukim Pekan Teluk, Daerah Kuala Langat, Selangor together with all its fittings and fixtures to TEOH YING RIN NRIC No: 761116-10-5370.

4. I give my shares in ADVANCED FERTILIZER MANUFACTURER SDN. BHD. (917252-W) to my wife SAVATERY A/P JAYARAMAN NRIC No. 580112-10-5944 totaling 1,250,000.00 Shares and to TEOH YING RIN NRIC No: 761116-10-5370 totaling 1,500,000.00 Shares.

5. I give my shares in ASIA FERTILIZER MANUFACTURER SDN. BHD. (175935-X) to SAVATERY A/P JAYARAMAN NRIC No. 580112-10-5944.

6. I give my share of condominium located at Petaling Jaya Ehsan Ria Condominium Parcel No.2103 Tower A with the Accessory Parcel No. CP 63 erected on the land held H.S.(D) 22816 Lot 265 District of Petaling Jaya, Selangor Darul Ehsan together with all its fittings and fixtures to my wife SAVATERY A/P JAYARAMAN NRIC No. 580112-10-5944.

7. I give my share of condominium located at Petaling Jaya Ehsan Ria Condominium Parcel No. 1406 together with the Accessory Parcel (car park) bearing No. 69 erected on the land held H.S.(D) 22816 Lot 265 District of Petaling Jaya, Selangor Darul Ehsan together with all its fittings and fixtures to my wife SAVATERY A/P JAYARAMAN NRIC No. 580112-10-5944.

8. I give my share of condominium located at Apartment Bunga Mawar, Genting erected on the land held No. MWD18B, Kawasan Taman Gohtong Jaya, Genting, Negeri Pahang together with all its fittings and fixtures to my wife SAVATERY A/P JAYARAMAN NRIC No. 580112-10-5944.

9. I give the monies standing to my credit in my RHB BANK BERHAD Current account (Account No: 2-12415-000-29249) and all the Fixed Deposit Accounts to my wife, SAVATERY A/P JAYARAMAN NRIC No. 580112-10-5944 (40%) and to TEOH YING RIN NRIC No: 761116-10-5370 (60%) in that proportion.

10. I give the monies standing to my credit in my PUBLIC BANK BERHAD Saving account (Account No; 6398-4421-18) and all the Fixed Deposit

Accounts (Account No: 1337 6926 28) to my wife SAVATERY A/P JAYARAMAN NRIC No. 580112-10-5944 (40%) and to TEOH YING RIN NRIC No: 761116-10-5370 (60%) in that proportion.

11. I give the monies standing to my credit in my STANDARD CHARTERED BANK IN SINGAPORE account to my wife SAVATERY A/P JAYARAMAN NRIC No. 580112-10-5944.

12. I give all vehicles I own at the date of my death to my wife SAVATERY A/P JAYARAMAN NRIC No. 580112-10-5944.

13. I give my residue estate to TEOH YING RIN NRIC No: 761116-10-5370.

[22] In the respondent's witness statement, particularly Q&A 17, the respondent stated that the testator specifically told her that he would leave everything behind (the testator's estate) to the respondent. The respondent further stated that on 25 June 2019, the appellant showed the respondent the impugned will together with two letters written by the testator, one addressed to the appellant and the other to the respondent. Both letters were dated 29 April 2019 (dated the same day as the impugned will was executed). The first letter (to the appellant) reads as follows:

> With regard to the above, I have today made a declaration to make you as a beneficiary and Trustee of my Will. I am certain that I am placing these in good hands. I have a deep respect for your good qualities, sincere hard work and intelligence. This is the reward for your diligence and loyalty to me.

[23] The second letter (to the respondent) reads as follows:

> With regard to the above, I have made a Will as regards my properties and monies.
>
> I want to thank you for your dedication and love shown to me.
>
> I have placed all my properties to Ms. Teoh Ying Rin (Nric No. 761116-10-5370). I have full faith in her continuing the operation of the company.
>
> As regards to your shares in Advanced Fertilizer Manufacturer Sdn. Bhd. and Asia Fertiliser Manufacturer Sdn. Bhd., please cooperate with her to carry on the business as I have done.
>
> This will benefit all including your good self.
>
> Thanking you.

[24] At all material times the respondent was in the belief that the testator would leave his entire estate to her upon the testator's demise. Unfortunately, that was not the contents of the impugned will. The respondent, after having learned of the events leading to the execution of the impugned will, raised those suspicious circumstances to defeat the probating of the whole impugned will.

[25] The learned High Court judge, as mentioned earlier, was not satisfied that the appellant had successfully dispelled those suspicious circumstances. With respect, this court finds that the learned High Court judge committed errors in the findings of facts leading to Her Ladyship's conclusion that the whole impugned will was invalid.

First error — The main reason of the learned High Court judge

[26] At para [105] of the grounds of judgment, Her Ladyship found that 'it is impossible for this court to determine which of defendant's evidence as to how she prepared the 2019 will is true since she did not produce the 2018 will in court or the paper on which she claims the testator had written his instructions to increase the percentage of shares in the company he was bequeathing to her in the 2019 will'. It was for that reason that the learned High Court judge found the appellant had failed to dispel or remove the suspicious circumstances.

[27] The fact of the non-production of the 2018 will could not be equated to the appellant having failed to remove the suspicious circumstance in reference to the testator's knowledge and approval of the contents, particularly para 4, of the impugned will. The non-production of the 2018 will was not material to the testator's knowledge and approval of the contents of para 4 of the impugned will. At the highest, the production of the 2018 will could only show that there were changes made to the percentage of the bequeathed shares in the company known as Advanced Fertilizer Manufacturer Sdn Bhd. It requires more than that to show that the testator did not have the knowledge and approval of the contents of para 4 of the impugned will, or the entire contents of the impugned will in order for the court to invalidate the impugned will wholly.

Second error — The two previous wills

[28] The learned High Court judge was suspicious of the appellant for failure to plead the existence of the two previous wills in her statement of defence. The learned High Court judge frowned upon the appellant only making a disclosure that the testator had previously made two wills in her affidavit-in-reply in an application for further and better particulars which was filed by the respondent. We find that this was irrelevant consideration because the testator's intention in the two previous wills was not relevant as they have been revoked. This has been confirmed in para 1 of the impugned will. What is material before the trial court was the testator's intention of the impugned will that was to be probated, not the intention of the testator in the previous will which had been revoked. A previous will is relevant when the challenge is against a purported will (allegation of a forged will) which is intended to be probated.

[29] This court observes from the evidence before the trial court that the respondent was not aware at all that the testator had in fact executed two previous wills, one in 2017 and the other in 2018. The making of the two wills was confirmed by Henry John (DW3) who had witnessed the two previous wills. This fact could infer that the testator did not disclose to the respondent that he had made a will in 2017, and later changed the will in 2018. It was, therefore, not surprising that the testator could have again changed his 2018 will in April 2019 without letting the respondent know.

Third error — Confusion of consideration

[30] The appellant did not deny that the testator was physically weak at the material time when the testator executed the impugned will. However, the testator's mental condition remained fit to understand what he was doing. Further, the respondent did not challenge the testamentary capacity of the testator. As alluded earlier, proving that the testator had the testamentary capacity is different from adducing affirmative proof to remove or dispel the existence of suspicious circumstances. The learned High Court judge had fell into error by mixing up the two when the learned High Court judge stated as follows:

> [30] She [the appellant] must, however, prove to the satisfaction of this court that the testator had the testamentary capacity to make the 2019 will, *and in doing so she must,* by adducing clear and cogent evidence, dispel any suspicions circumstances in the making of the 2019 will.

[31] Although the burden lies with the appellant to satisfy the court that the testator had the testamentary capacity as well as to dispel or remove any suspicious circumstances (if exist) surrounding the making of the impugned will, the consideration for the two are somewhat different. The former requires 'clear evidence to depict on insane delusion existing in the testator's mind at the time of making of the will;' whereas, the latter requires affirmative proof to dispel or remove the suspicious circumstances in reference to the testator's knowledge and approval of the part of the will in question or the whole of the will. The former goes to the very root of mental capacity, and the latter goes to the testator's knowledge and approval of the terms of the will.

[32] In the present case, the appellant adduced two important documents to substantiate the fact that the testator had the knowledge and had given his approval of the whole contents of the impugned will. As mentioned earlier, the two letters, one to the appellant and the other to the respondent, if considered as a whole vis a vis reading the impugned will together with the two letters, it could well establish that the testator was fully aware of the making of the impugned will as well as that he had full knowledge and approval of the entire contents of the impugned will. The learned High Court judge merely made

mention of the two letters in her grounds of judgment. Her Ladyship did not make any finding the two letters were forged or that the contents of the two letters had been disproved. Therefore, the two letters stand as credible evidence before the trial court to support the testator's knowledge and approval of the contents of the entire impugned will, not just para 4 of the impugned will.

[33] In fact, the two letters, in the opinion of this court, are sufficient evidence to dispel or remove any suspicious circumstances surrounding the making of the impugned will. The two letters, which were admitted as evidence and were not disproved, are the best evidence to show the testator had the knowledge and had given his approval of the contents of the impugned will. The two letters were dated the same date as the impugned will, therefore, that infers the testator executed them on the same day and that the testator was certain as to how he wanted to dispose his properties upon his demise.

Fourth error — Over emphasis of mental capacity

[34] As mentioned earlier, the respondent had abandoned the challenge of testamentary capacity of the testator, therefore, it was unnecessary for the trial court to delve into the factual evidence of the mental capacity of the testator to consider whether the testator was of sound mind in making the impugned will.

[35] Conceivably, the learned High Court judge could have been confused in her consideration of evidence in proving testamentary capacity and consideration of evidence in dispelling or removing suspicious circumstances surrounding the making of the impugned will in reference to the testator's knowledge and approval of the terms of the impugned will. The learned High Court judge discussed in length the medical condition of the testator from the period between January and April 2019, viz the period before the execution of the impugned will on 29 April 2019, such medical condition would only have been relevant to the testamentary capacity of the testator.

[36] Although the testator's health and physical strength was weak and he had to travel in a car for several hours before he finally executed the impugned will in his office, those facts could not infer that the testator did not have the knowledge or did not approve the contents, particularly para 4, of the impugned will. Conversely, the fact that the testator could travel in the car for several hours infers two things. First, although he could have been weak, he had the physical strength to travel for long hours. Secondly, it shows that the testator's mind was adamant to get his will executed properly, and it shows the testator had the mental strength as well, not just physical strength. There was no evidence to suggest the testator was incapable of knowing what he was doing throughout the whole journey in seeking to get his will executed properly.

Fifth error — Evidence of the two witnesses

[37] The evidence (witness statements) of the two witnesses who witnessed the testator's signature, especially Nor Hidayu (DW4) whom the learned High Court judge found to be 'a most reluctant witness', could only go to the formation of a valid will, not for purpose of determining the impugned will to be invalid for not dispelling or removing the suspicious circumstances surrounding the making of the will.

[38] The role of the witnesses of the impugned will was to witness the signing and verify that it was the testator who signed on the will. They were not to verify the testator was fully aware of the terms of the will, and that the testator acknowledged and approved each and every term of the impugned will. There was no evidence to suggest the testator was illiterate. There was also no evidence to suggest that the testator did not understand the contents of the impugned will and the two letters when he signed on those documents.

[39] The two witnesses confirmed they witnessed the testator signed the impugned will before them. Therefore, the legal requirement that a will has to be executed in the presence of two or more witnesses present at the same time was fulfilled as required in s 5(2) of the Act.

[40] There was also no evidence from the two witnesses that could suggest the testator was reluctant to execute the impugned will or that he could not comprehend the terms of the impugned will he was signing. Further, there was no evidence that could suggest the witnesses were in cahoots with the appellant to deceive the testator into signing the impugned will. In fact, it was the testator who sought the assistance of the two witnesses to witness the execution of the impugned will.

Sixth error — Failure to appreciate the overall evidence

[41] One of the most important pieces of evidence, or in fact the best evidence, that could dispel or remove the suspicious circumstances surrounding the making of the impugned will is evidence that shows that the testator knew and approved of the contents of the impugned will. The whole idea of the rule of suspicious circumstances is to satisfy the conscience of the court that the instrument so propounded is indeed the last will and testament of a free and capable testator (see *Barry v Butlin*). Suspicious circumstances are mere evidence of facts leading to speculation that the testator may not have knowledge and approval of the contents or part of the contents of a will. As long as the suspicion is removed by affirmative proof, through admitted evidence in the trial, that the testator had the knowledge of and had given his approval to the impugned will, that would suffice to satisfy the conscience of

A the court. The court should disregard whether the way in which the testator had decided to distribute his assets in the impugned will was 'fair' or 'unfair' to the respondent.

B **[42]** One very conspicuous evidence of the testator's knowledge and approval of the terms of impugned will is found in the letter to the respondent. In the letter, the testator stated 'I have placed all my properties to Ms Teoh Ying Rin ... I have full faith in her continuing the operation of the company'. Another part of the same letter the testator stated: '... please cooperate with her to carry on the business as I have done. This will benefit all including your good C self'. The said letter speaks volume of the testator's wishes. The testator wanted his business legacy to continue and at the same time he wanted the respondent to enjoy the profits as long as the business continues to do well.

D **[43]** It is not in dispute that the testator had founded the company(ies) and built the business from a small business to a very successful business. He had worked very hard for the business. He had loyal employees who had worked many years in his company(ies), for example, Henry John (DW3) and the appellant who had worked for the testator for many years. The testator had a E strong character. He knew what he was doing at all times, even when the testator was terminally ill. The testator was the one who instructed the two witnesses to witness his will. The testator could have refused to be fetched around to look for witnesses for his impugned will if he so wished on that day (29 April 2019), but there was no evidence to suggest that he did not agree to F the arrangement.

[44] The overall evidence could proffer that the testator was of strong character, he knew what he was doing at all times, and that he appreciated and cherished his employees for their loyalty and friendship.

G

[45] Therefore, based on the above evidence, it could not be said that the suspicion was not dispelled or removed to satisfy the conscience of the court. Although the suspicious circumstances raised by the respondent (see para [20]) have satisfied the court to be cautious in granting a probate for the impugned H will, the apprehension remains as speculation in nature. This court is of the considered view that the appellant's evidence has sufficiently dispelled and removed the suspicious circumstances surrounding the making of the impugned will.

I *Undue influence*

[46] For completeness, this court, after having combed through the evidence, could not find any evidence that undue influence has been proven by the respondent in the trial. 'Undue influence' in the context of probating a will

is where coercion was present (see *Wingrove v Wingrove* (1885) 11 PD 81). Coercion could take many forms, such as by force or pressure exerted by talking insistently to a weak and feeble testator in the last days of his life to fatigue his brain that he may be induced, for quietness' sake, to give way to the pressure (see *Lamkin v Babb* (1752) 1 Lee 1).

[47] There is not an iota of evidence that could suggest the testator was coerced into executing the impugned will outside his own free will or that he did not desire to do. The testator was prepared and willing to execute the impugned will in the morning of 29 April 2019. There was no evidence from the two witnesses of the impugned will that could suggest that the testator was coerced in any form while the testator was executing the impugned will. Although it took several hours before the impugned will was executed by the testator, that could not be a coercion in any form. Conversely, it shows that the testator was so adamant to get his will signed properly, otherwise he would not have to insist the trouble to sign before a legal officer or a lawyer.

CONCLUSION

[48] It is trite law that an appellate court should not interfere with the finding of the trial judge unless there is obvious error of finding which is plainly wrong, or that there is lack of judicial appreciation (see: *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 (FC); *Gan Yook Chin & Anor*). In this present case, this court is satisfied that the trial judge had fell into error of law on the evidence to dispel or remove the suspicious circumstances and had lacked judicial appreciation of the evidence of fact presented before the trial court. For the above reasons, this court is prepared to allow the appeal. This court hereby orders that the High Court order dated 18 January 2023 be set aside, and further orders that costs of RM130,000 (subject to allocator) here and below to be paid by the respondent to the appellant.

Appeal allowed.

Reported by K Selvaraju